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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NO 990

THOMAS L. THAGGARD,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Thomas L. Thaggard,
1092 Rosedale Drive
Montgomery, Alabama
Pro Se

Ira De Ment
P. O. Box 4163
Montgomery, Alabama
Of Counsel

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The Petitioner Thomas L. Thaggard, pursuant to Rules 19 and 21, Revised Rules of the Supreme Court of the United States, Tit. 28, **Rules,** U.S.C.A., respectfully petitions this Honorable Court to issue its writ of certiorari to the United States Court of Appeals for the Fifth Circuit in order to review the judgment of said court rendered pursuant to opinion in the case of **Thomas Lester Thaggard vs. United States of America,** (Cir. 5, 1965), ____ Fed.2d ____, per Tuttle, C. J., Gewin and Coleman, JJ. (No. 22120, decided December 6, 1965, Petition for Rehearing denied, Motion to Extend Opinion denied, Motion to Certify Questions denied, January 6, 1966), a copy of which is appended hereto pursuant to Rule 23(i), Rules, supra.[1]

[1] For reported decisions of the Courts of the State of Alabama based on a state criminal prosecution arising out of the same facts and on a subsequent civil action in equity, see **Ex parte T. L. Thaggard,** (1963), 42 Ala. App. 229, 159 So.2d 813, certiorari denied 276 Ala. 117, 159 So.2d 820 and **T. L. (Cotton) Thaggard, et al vs. Union Bank & Trust Company,** (1965), 277 Ala. 485, 172 So.2d 49.

JURISDICTION AND GROUNDS

The jurisdiction of this Honorable Court is invoked to review said judgment of December 6, 1965, pursuant to §1254(1) Tit. 28, United States Code, (Rule 23(b), **Rules,** supra) on the following grounds, demonstrating, pursuant to Rule 19, **Rules,** supra, the special and important reasons therefor, to-wit:

(1) The decision of the Court of Appeals for the Fifth Circuit is in conflict with the decision of the Court of Appeals for the Fourth Circuit in the case of **United States v. Rogers,** (Cir. 4, 1961), 289 Fed.2d 433, as concerns the construction of the Federal Bank Robbery Act (§2113, Tit. 18, United States Code). Certiorari will be granted where two Courts of Appeal have reached contrary results in the construction of a federal statute. **U. S. v. Muniz,** N. Y. 1963, 83 S.Ct. 1850, 374 U.S. 150, 10 L.Ed.2d 805. Rule 19.1. (b), **Rules,** supra.

(2) The Court of Appeals for the Fifth Circuit has misconceived the meaning of **United States v. Turley,** Md. 1957, 77 S.Ct. 397, 352 U.S. 407, 1 L.Ed2d 430, which it found to be controlling with regard to Petitioner's case. This affords a valid ground for certiorari. **Wilkinson v. U. S.,** Ga. 1961, 81 S.Ct. 567, 365 U.S. 399, 5 L.Ed.2d 633, rehearing denied 81 S.Ct. 1024, 365 U.S. 890, 6 L.Ed.2d 200. Rule 19.1.(b), **Rules,** supra.

(3) The Court of Appeals for the Fifth Circuit has decided a federal question in a way in conflict with applicable decisions of this Honorable Court. Rule 19.1.(b) **Rules,** supra.

(4) The Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Honor-

able Court's power of supervision. Rule 19.1.(b), **Rules,** supra.

(5) The Court of Appeals for the Fifth Circuit has so far sanctioned such a departure by a lower court as is noted in ground (4) hereof, as to call for an exercise of this Honorable Court's power of supervision.

QUESTIONS PRESENTED FOR REVIEW

It is respectfully alleged, pursuant to Rule 19.1.(c), that the following are the questions presented for review, to-wit:

(1) Whether the Federal Bank Robbery Act (§2313(b), Tit. 18, United States Code) in using the common law term "takes and carries away, with intent to steal, etc." declares common law larceny?

(2) Whether the case of **United States v. Turley,** 1957, Md., 77 S.Ct. 397, 352 U.S. 407, 1 L.Ed.2d 430, stands for the proposition that a criminal statute couched in terms of the felonious "taking and carrying away . . ." of the personal property of another declares other than common law larceny?

(3) Whether an appellate court can affirm a judgment of conviction erroneously secured in a felony case on one theory, on the speculation that conviction would have followed if the correct theory had been applied?

(4) Whether it is error in a felony case to give an expanded version of the "Allen" charge (**Allen v. United States,** Ark. 1896, 17 S.Ct. 154, 164 U.S. 492, 41 L.Ed.528)[2]

[2] Also known as, and sometimes called, the "dynamite charge", "shotgun instruction", and "nitroglycerin charge". Appropriately and officially indexed by West Publishing Company, St. Paul Minn. and Edward Thompson Company Brooklyn, N.Y. in the **United States Code Annotated,** Tit. 18, Rule 30, Note 12a under "—Third degree instructions."

to include a charge that "all trials are expensive. Your failure to agree upon a verdict will necessitate another trial equally expensive" and "you should consider that the case must at some time be decided," and this, in the absence of a request to do so, and on a second trial where there had been a previous hung jury and subsequent mistrial.

(5) Whether upon giving a supplemental charge to a jury upon its failure to agree in a felony case, a trial court is required on timely motion to charge additionally on burden of proof and presumption of innocence?

CONSTITUTIONAL PROVISIONS AND STATUTES

The constitutional provisions and statutes which this case involves are as follows, viz:

(1) §2313(b), Tit. 18, United States Code:

> "(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100.00 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $5,000.00 or imprisoned not more than 10 years, or both . . ."

(2) Art. III, Sec. II, C1.3, Constitution of the United States:

> "The trial of all crimes, except in cases of impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the trial shall be at such Place or Places as the Congress may by Law have directed."

(3) Amendment 6, Constitution of the United States: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

(4) Amendment 5, Constitution of the United States: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; . . ."

STATEMENT OF THE CASE

On February 19, 1963, the Union Bank & Trust Company, Montgomery, Alabama, a bank insured by the Federal Deposit Insurance Corporation. (Tr.p.50), received two deposits aggregating approximately Forty-Three Thousand Dollars in United States currency for the account of the Alabama Power Company. (Tr.p.41). Due to a mistake on the part of a bookkeeper of the bank, (Tr.p.47), who bypassed the controls of a posting machine, (Tr.p.44), this sum was credited to the account of Alabama Motors Company on the day of deposit. (Tr.p.43).

Petitioner Thomas L. Thaggard, maintained an account in the Union Bank & Trust Company under the name of Alabama Motors Company. On the morning of March 6, 1963, Petitioner went to the statement teller of the Bank and requested his balance. (Tr.pp.113,114). By interphone in the usual and customary way, the statement teller ob-

tained from the bookkeeping department the balance in the Alabama Motors Company account, then wrote same down, (Tr.p.114), in the amount of Forty-Three Thousand Dollars, which balance she then verified with the bookkeeping department at his request. (Tr.p.115).

Petitioner then proceeded to the window of a paying teller of the bank and again asked for his balance in his account of Alabama Motors Company. (Tr.p.27). This teller called to the bookkeeper, gave him the account number, and requested the balance. (Tr.p.28). Upon receiving the balance as being in excess of Forty-Three Thousand Dollars, she wrote it down on paper and pushed this across to Petitioner. (Tr.p.32). He thereupon handed her a bank check in the amount of Forty-Three Thousand Dollars, (Tr.p.33), and said he wanted to withdraw that amount. (Tr.p.28). At the paying teller's request Petitioner endorsed this check, whereupon the teller again called the bookkeeping department to determine whether there were any uncollected fund claims against the account, thereafter paying the amount of the check to the Petitioner. (Tr. pp.29,30). The paying teller assumed that the check was good, according to what the bookkeepers had said, and paid him what she intended to pay, not misreading the check. (Tr.p.34). Petitioner made no representations of any kind other than endorsing and presenting the check. (Tr.p.32).

Subsequently, Petitioner was prosecuted in the courts of The State of Alabama for the crime of flase pretense. **Ex parte T. L. Thaggard,** (1963), 42 Ala. App. 229, 159 So.2d 813, certiorari denied, 276 Ala. 117, 159 So.2d 820, and was at the same time adjudged in contempt of a State Circuit Court for failure to disclose on a deposition on oral examination, and pending the prosecution for false pretense, the location of the Forty-Three Thousand Dollars

in question. **Ex Parte T. L. Thaggard,** ((In the Supreme Court of the State of Alabama, October Term 1962-63, 3rd Division 60.) Re: (**T. L. Thaggard vs. Honorable Eugene W. Carter** as Judge of the Circuit Court of Montgomery, County, Alabama) Re: (Union Bank & Trust Company a corporation v. T. L. (Cotton) Thaggard).) (Tr.p.4). Also material are two civil suits. One is at law, ((**Union Bank & Trust Co., a corporation vs. T. L. (Cotton) Thaggard,** (In the Circuit Court of Montgomery County, Alabama, At Law, Case No. 3866.)), and one in equity in which judgment was had against Thaggard for $43,000.00 and in which all his constitutional and common law exemptions were disallowed prior to the sale by the Sheriff of Montgomery County of all his property, including an undivided one-half interest in his homestead. **T. L. (Cotton) Thaggard et al vs. Union Bank & Trust Company,** (1965), 277 Ala. 485, 172 So.2d 49. The case also contains a motion to recuse directed to the State Committing Magistrate who initially considered the false pretense case, and his subsequent recusal on the ground of pecuniary interest. **City of Montgomery vs. T. L. Thaggard, alias Cotton Thaggard.** (In the Recorders Court of the City of Montgomery, Alabama, Case No. 73788); an alternative writ of mandamus issued out of the Court of Appeals of the State of Alabama, directed to the Sheriff of Montgomery County commanding him to take and approve a valid $25,000.00 appearance bond set by that Court and tendered by the Appellant. **Ex parte T. L. Thaggard,** (In the Court of Appeals of the State of Alabama, October Term, 1962-63, 3rd Division 146.) Re: (**T. L. Thaggard vs. Honorable Mac Sim Butler, as Sheriff of Montgomery County, Alabama**); and a mistrial in the United States District Court for the Middle District of Alabama after a petit jury deliberated some seven and one-half hours. **United States v. T. L. Thaggard,**

(In the United States District Court for the Middle District of Alabama, Northern Division, March Term, 1964, No. 11624-N). Thereafter, Petitioner was indicted for the offense of grand larceny in violation of §2113(b), Tit. 18, United States Code, (Tr.pp.2,3), pleas of former jeopardy (antrefois acquit) and res judicata via collateral estoppel were summarily denied, Petitioner pleaded not guilty, and after a second trial by jury in the United States District Court for the Middle District of Alabama, was convicted, (Tr.p.175), and committed to the custody of the Attorney General of the United States for a period of five years, (Tr.pp. 179, 180), from which judgment and commitment he prosecuted an appeal to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals affirmed the judgment of conviction and denied a petition for rehearing, a motion to extend opinion and a motion to certify questions to the Supreme Court.

ARGUMENT AMPLIFYING REASONS

The Petitioner contends that §2113(b) Tit. 18, United States Code, declares the offense of common law larceny. Indeed, the United States Court of Appeals of the Fourth Circuit has so held in the case of **United States v. Rogers**, (Cir.4. 1961), 289 Fed.2d 433. The analogy of §2113(b) supra, (Federal Bank Robbery Act), to §2312, Tit. 18, United States Code, (National Motor Vehicle Theft Act), is clearly laid in error. In §2312, (National Motor Vehicle Theft Act), the word was "stolen". The Supreme Court said "(w)e recognize that where a Federal criminal statute uses a common law term of established meaning without otherwise defining it, general practice is to give that term its common law meaning (citing footnote) but 'stolen' (or 'stealing') has no common law meaning." **United States v. Turley**, Md. 1957, 352 U.S. 407, 1 L.Ed.2d, 430, 77 S. Ct. 397.

In its opinion below, the Court of Appeals stated that the statute here in question, i.e. §2113(b), (Federal Bank Robbery Act), makes no mention of "larceny"; but is couched in terms of "steal and purloin". This statement is erroneous. The statute is couched in terms of "takes and carries away, with intent etc." Only the **intent** element is couched in terms of "steal and purloin". The prima facie act is couched in terms of "taking and carrying away." The "act" of "taking and carrying away" is not malum in se. **Morissette vs. United States,** 342 U.S. 246, 72 S.Ct.240, 96 L.Ed. 288. These are the classical, traditional, descriptive words of common law larceny. **United States v. Rogers,** supra, IV Blackstone, **Commentaries,** 229, 232; Black's Law Dictionary, Fourth Edition, St. Paul, Minnesota, 1951, **Common Law Larceny,** page 1023. Any dictionary will so define "larceny", e.g. Webster's Seventh New Collegiate Dictionary, G & C. Merriam Company, Springfield, Massachusetts, 1963, defines "larceny" as the unlawful "taking and carrying away" etc., the precise, exact, same, identical, very words used in §2113(b), Tit. 18, U. S. C. The **Turley** case, supra, on which the Court of Appeals relied, so holds. On page five of its opinion, the Court of Appeals quotes from the opinion in **Turley** wherein this honorable court acknowledges that the definition of larceny is— "the felonious taking and carrying away of the personal goods of another". It is restating the obvious to say that these are the very words of the statute which we are here considering, and which the Court of Appeals says do not declare common law larceny. Petitioner respectfully avers further that the opinion of the Court below has done with a stroke of the pen what the Congress of the United States has never done, i.e. made §2313(a) (Robbery) and §656 (Embezzlement) Tit. 18, U.S.C., pure surplusage and passe, for they are certainly no longer needed with the new scope

afforded §2113(b), i.e. "taking and carrying away", as wide as the color spectrum. Hence, the opinion below is squarley contra to **United States v. Rogers,** supra. The statute must be strictly construed. Due process of law requires as much. Please see the excellent collection of federal and common law authorities in **Shuttlesworth v. City of Birmingham,** (1965), ____Ala. App.____, 180 So.2d 114, 131 et seq.[3] The above argument amplifies reasons numbers one, and two, supra. Rule 23(h), **Rules,** supra.

The opinion below acknowledges that the trial Judge charged on "common law larceny". (Tr.p. 189). The Court of Appeals then holds that the charge was erroneous; but the error was harmless and that the defendant (Petitioner) was "benefited." (Tr.p. 191). It then affirms the judgment of conviction. In **Bollenbach v. United States,** 1946, 326 U.S. 607, 66 S.Ct. 402, 90 L.Ed. 350, Mr. Justice Frankfurter with force and conviction stated:

> "(W)e cannot treat the manifest misdirection in the circumstances of this case as one of those 'technical errors' which 'do not affect the substantial rights of the parties' and must therefore be disregarded. 40 Stat. 1181, 28 U.S.C. §391, 28 U.S.C.A. §391. All law is technical if viewed solely from concern for punishing crime without heading the mode by which it is accomplished. * * * Diviations from formal correctness do not touch the substance of the standards

[3] If this Honorable Court grants its writ of certiorari in this case, then Petitioner will demonstrate that the facts proved below do not consitute common law larceny by mistake because of the absence of a trespass to title in the taking. Petitioner does not here make any argument in this regard because as he reads Rules 19 and 21, **Rules,** supra, such would not be proper at this point. See however, **United States v. Patton,** (3rd Cir. 1941), 120 Fed.2d 73; **Murphy v. United States,** (5th Cir. 1953), 206 Fed.2d 571; Perkins, **Criminal Law,** (Brooklyn, The Foundation Press 1957), at page 213.

by which guilt is determined in our courts, and it is these that Congress rendered harmless. * * * From presuming too often all errors to be 'prejudicial' the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by jury under appropriate judicial guidance, however cumbersome that process may be."

Also, we quote from **Wilson v. United States,** (C.C.A.9), 1958, 250 Fed.2d 312, 324, 325:

"It is a fundamental precept of the administration of justice in the federal courts that the accused must not only be guilty of the offense of which he is charged but convicted according to proper legal procedures and standards. In short, it is not enough that the accused be guilty; our system demands that he be found guilty in the right way. Accordingly, it is no answer to the application of an erroneous standard of law that the evidence is sufficient to support a verdict reached in accordance with the proper standard of law. As the Supreme Court stated in a jury case in respense to such a contention.

'It may not be amiss to remind that the question is not whether guilt be spelt out of a record, but whether guilt has been found by a jury according to the procedures and standards appropriate for criminal trials in the

federal courts.' **Bollenbach v. United States,** 326 U.S. 607, 614-615, 66 S.Ct. 402, 90 L.Ed.350.

The decisions are plentiful that an appellate court cannot affirm a conviction erroneously secured on one theory, on the speculation that conviction would have followed if the correct theory had been applied. **Pearson v. United States,** 6 Cir. 192 F.2d 681; **People v. Bigley,** 178 Misc. 552, 35 N.Y.S.2d.130; **People v. Roper,** 259 N.Y. 170, 181 N.E. 88; **People v. Hewlett,** 108 Cal. App.2d 258, 239 P.2d 150, 159; 24 C.J.S. Criminal Law §1834, p. 676.

It does not matter whether or not guilt is a close question. The accused is entitled in any case to be tried under proper legal criteria."

Please see the argument in the petition for rehearing before the Court of Appeals. (Tr.pp.202-211). The writer of this brief, with all the emphasis which can be conveyed by the printed word, sincerely denies that Petitioner was benefitted by the erroneous charge. If anything, he was denied the basic right to effective counsel. Art. VI, Constitution of the United States. (Tr.p. 209). Further, the opinion below has made every non-collusive, intentional or even negligent over-draft a prima facie violation of The Federal Bank Robbery Act and a bank employee who now willingly permits an overdraft becomes prima facie an aider and abettor, also a federal crime.

Additionally, and concerning ground five, supra, the trial court, on the first and second trials of this case, gave the so called "Allen" or "dynamite" charge to the jury, on its own motion. Previously, there had been a mistrial because of a hung jury, where the same charge was also given. In the charge, the Court admonished

the jury that "all trials are expensive" and that they" * * * must consider that the case must sometime be decided." Petitioner contends that both of these statements constitute error to reverse. The "all trials are expensive" aspect of the charge was recently disapproved. **United States v. Smith**, (1962), 303 Fed. 2d 341. The charge that the case "must at sometime be decided" was held erroneous in **U. S. v. Gordan**, (1952), 196 Fed. 2d 886, reversed on other grounds 73 S.Ct. 369, 344 U. S. 414, 97 L.Ed.447. This Honorable Court recently disapproved of such a charge in **Jenkins v. U.S.**, (D.C. 1965), 85 S.Ct. 1059, 380 U.S. 445, 12 L.Ed.2d 957. The special concurring opinion in the decision of this case in the Court of Appeals condemned the giving of this charge, and three Judges of that Court have now expressed disapproval of the charge, i.e. Brown, J. in **Huffman v. United States**, (C.C.A. 5), 297 Fed. 2d 754, (1962), Widsom, J. in **Andrews v. United States**, (C.C.A. 5), 309 Fed. 2d 127, (1962); and in **Green v. United States**, (C.C.A. 5), 309 Fed 2d. 852, (1962); and Coleman, J. in the instant case.

Finally, and this argument admittedly amplifies no ground, supra, Petitioner respectfully requests this Honorable Court to reexamine its prior holdings as same concern former jeopardy in relation to a previous State prosecution. Please see the dissenting opinions of the Chief Justice and Black and Douglas, JJ. in **Bartkus v. Illinois**, 1959, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684, rehearing denied 360 U.S. 907, 79 S.Ct. 1283, 3 L.Ed. 2d 1258; **Abbate v. U.S.**, 1959, 359 U.S. 187, 79 S. Ct. 666, 3 L.Ed.2d 258, dissenting opinions of Brennan, Black and Douglas, JJ., Warren, C. J. concurring.

CONCLUSION

Petitioner was vigorously prosecuted by the State of Alabama for the common law crime of false pretense.[4] Thereafter, he was vigorously prosecuted twice by the United States on a theory of larceny. Both times the jury hung. In the first trial the jury stayed hung after the "Allen" charge plus. In the second trial the "— Third degree instructions" were effective. The jury convicted. The Court of Appeals held that Petitioner was tried on the wrong theory of law, rewrote the statute in question and then decided that Petitioner was guilty under their new construction of the statute. Chief Judge Tuttle and Judges Gewin and Coleman are "able, dedicated, experienced Judges"[5] for whom the writer of this petition has the highest respect; but they do not satisfy the constitutional requirement of impartial jurors in a criminal case.

Petitioner respectfully asks the Court to issue its writ in this case.

Thomas L. Thaggard, Pro Se

Ira De Ment Of Counsel[6].

Thomas L. Thaggard, Pro Se
1092 Rosedale Drive
Montgomery, Alabama

Ira De Ment, Of Counsel
P. O. Box 4163
Montgomery, Alabama, 36104

AFFIDAVIT OF SERVICE

Before me, Omega N. Huckeby, a Notary Public in and for the State of Alabama at Large, personally appeared Ira De Ment, who being known to me and being by me first placed under oath, did depose and say that he has served copies of the foregoing petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit, upon the United States of America by depositing a copy of same, first-class postage prepaid, in the U. S. Mail properly addressed to the Solicitor General, Department of Justice, Washington 25, D. C., and to Honorable Ben Hardeman, United States Attorney for the Middle District of Alabama, Montgomery, Alabama, attorney of record for the Respondent in the Court of Appeals for the Fifth Circuit in complainance with Rules 33 2(a) and 33 3(c), Supreme Court Rules, Tit. 28, U.S.C.A.

Ira De Ment

Ira De Ment

Sworn to and subscribed before me this the 3rd day of February, 1966 at Montgomery, Alabama.

Omega N. Huckeby

Notary Public for State of Alabama at Large

[4] The opinions of the State Appellate Courts are cited supra.

[5] Tr.p. 198.

[6] Petitioner's attorney is not yet admitted to the bar of this Honorable Court. His admission has been approved; but he will be unable to appear for admission until February 21, 1966 as this is when the Court reconvenes. The petition must be filed, however, on or before February 5, 1966. Hence the petition is filed by petitioner, pro se, with his attorney appearing of counsel, until admission.